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January 24, 2008

BY HAND

Ms. Marlene Dortch
Secretary
Federal Communications Commission
The Portals, Room TW0A325
445 Twelfth Street, SW
Washington, DC 20554

FILED/ACCEPTED

JAN 24 2008

Federal Communications Commission
Office of the Secretary

Re: Ex Parte Communications in CS Docket No. 97-80
(Commercial Availability of Navigation Devices)

Dear Ms. Dortch:

This letter is submitted on behalf of Broadcast Music, Inc. ("BMI") with regard to the above-captioned proceeding. BMI and ASCAP submitted joint comments in this proceeding, asking the Commission to include in any rules adopted a provision to protect the monitoring of performances of copyrighted music contained in commercial audio-visual content by performing rights organizations ("PROs").¹ On September 10, 2007 the Consumer Electronics Association ("CEA"), the Digital Transmission Licensing Administration, LLC ("DTLA") and the National Cable Television Association ("NCTA") submitted comments in this proceeding addressing the PROs' proposal.

In their Joint Comments, BMI and ASCAP identified a need for the Commission to protect the ability of PROs to monitor airplays of music in television programs that are subject to content protection regimes endorsed or permitted by the Commission's plug and play rules, or incorporated in devices approved by the Commission's plug and play rules, including the encoding rules at 47 C.F.R. §76.1901, *et seq.*

Both the DTLA and the NCTA suggest that there is no need for the Commission to act because the PROs' legitimate monitoring needs can be met through licensing in the marketplace. The NCTA states that it offered BMI a license for a nominal fee to access the DFAST algorithm, subject to BMI's use of approved content protection rules. BMI has undertaken negotiations with CableLabs as well as with the DTLA and agrees that marketplace licenses are appropriate. However, this does not eliminate the need for a monitoring rule. The rule proposed by BMI and ASCAP would accomplish three compelling objectives: (1) confirm that PRO monitoring does not violate Commission

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¹ See Joint Comments of Broadcast Music, Inc. and the American Society of Composers, Authors and Publishers, submitted on August 24, 2007 (the "Joint Comments").

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plug and play regulations; (2) guarantee the availability of *de minimis* fee licenses to access any and all types of protection regimes if and as needed in the future as the technology of content protection develops and changes over time; and (3) ensure that content owners do not require PROs to adopt unreasonably expensive or burdensome downstream content controls as a condition for licensed access to the content.

Content owners and the cable industry are apparently willing to accommodate needs of the PROs now, while proposed rules protecting their respective economic interests within the industry are before the Commission, but there is no guarantee that this favorable climate will prevail in years to come once the rules are finalized and content protection devices are entrenched in the marketplace.

Both the DTLA and the CEA state that BMI and ASCAP did not provide sufficient specifics about their monitoring needs to allow the FCC to address them. BMI disagrees. It is not necessary for the Commission to examine the specifics of the many different system architectures made possible by new digital monitoring technologies. BMI and ASCAP will each doubtless have its own proprietary system. What is needed is a general acknowledgement of the lawfulness of the music-use monitoring function. Nevertheless, BMI will explain its system in more detail.

BMI, through its wholly-owned subsidiary, Landmark Digital Services ("Landmark"), has purchased a patented pattern recognition algorithm that can fingerprint audio and television programs. Attached is a document further describing the algorithm. Landmark will set up monitoring stations in major and smaller television markets throughout the United States. The monitoring stations will make fingerprints of programs broadcast and distributed over cable. The fingerprints are then matched to a database of fingerprints previously made that identify television programs and films. Once the programs aired are identified in this fashion, the information is cross-referenced with BMI's database of information about the musical "cues" contained in each program. This cue sheet database contains the data essential for BMI's quarterly royalty distributions.

Contrary to the CEA's apparent concern that BMI seeks free access to programming for which consumers pay, Landmark in fact purchases subscriptions to cable programming packages in each market, just as every consumer does, and Landmark is not seeking to be relieved "by regulation of paying for the same licenses for which consumers directly or individually pay." CEA Reply at 38. Landmark utilizes a computer at each location to monitor the airplay over selected channels. Fingerprints are made of each show and sent to a central computer to be matched to Landmark's fingerprint database. Copies of entire programs are made locally for auditing purposes and kept in a memory database for a short time, after which the copies are written over by copies of newly obtained shows. Copies of entire programs are transmitted to the Landmark central computer only in the event the fingerprints are not matched. Critical to

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the architecture of Landmark's system is that both fingerprints and copied programs are transmitted using a highly secure Virtual Private Network.

"Copy Never" encoding obviously prevents this system from functioning, as does "Copy One Time" to the extent that it prohibits retransmission of content. The current OCAP system that NCTA is asking the Commission to adopt for bi-directional cable devices also has a redistribution control trigger. NCTA Reply at 14. Moreover, the Motion Picture of Association of America ("MPAA") is seeking additional content control protection from the FCC such as selectable output control ("SOC"). In this regard, the Home Recording Rights Coalition ("HRRC") claimed in its reply filing in support of the current encoding rules that the NCTA and MPAA are seeking "minute control over the functionality of receiving devices." HRRC Reply at 3.

As for the DTLA, it states that DTCP software is "required for plug-and-play digital cable products using IEEE 1394 under the DFAST, PHILA, CHILA and DCAS licenses." DTLA Reply at 3. The DTLA notes that the FCC's current encoding rules "set a ceiling on content protection for certain types of content, and guarantee basic recording and networking privileges for consumers." DTLA Reply at 5. The DTLA does not believe the Commission should endorse SOC capability because to do so would pose a risk of disenfranchising certain consumer rights and benefits. DTLA at 7. Clearly, whether the encoding rules are described as "caps" on protection or not, the Commission has been asked to regulate in the area of content protection and has acted to safeguard certain copying activities already. This is for the benefit of all affected parties, including consumers who are interested in getting high-quality content at affordable prices, and cable owners who are concerned about theft of services. The Commission clearly has jurisdiction to regulate the design and operation of commercial television receiving devices, even though its regulations under communications law may have an ancillary impact on copying and program distribution.

BMI has no interest in jeopardizing the security from piracy or signal theft of the very copyright content and program distribution industries that serve to support songwriters' livelihoods. BMI is a partner with these industries with interests that are fully aligned. BMI has committed to undertaking reasonable steps to protect any information accessed for monitoring. BMI is concerned, however, that notwithstanding the foregoing, CableLabs and the DTLA (or other similar entities in the future) will ask PROs to adopt or create unwieldy and/or highly expensive content protection technologies to protect downstream content. The Commission's adoption of BMI and ASCAP's proposed rule will prevent them from doing so.

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The CEA contends that the BMI/ASCAP proposal for a monitoring regulation would be an "exemption from the DMCA." This argument is a red-herring in this context. There is nothing inconsistent with the Digital Millennium Copyright Act in the BMI/ASCAP monitoring proposal. First, the DMCA's section 1201(k) contains a professional recording device exemption already, so Congress obviously did not intend to stop the use of "device(s) for a lawful business or industrial use, including making, performing, displaying, distributing or transmitting copies of motion pictures on a commercial scale." 17 U.S.C. §1201(k)(4)(D). More important, the BMI/ASCAP proposal is for a licensed use, not the right to circumvent, and the complex fabric of the plug-and-play regulations is under-girded by many licensed uses of technology. It is not a significant burden to bear for the cable, consumer electronics and copyright industries to be required to license monitoring access privileges to PROs in return for the Commission adopting a regulatory regime protecting high-value programs and creating competition among device manufacturers in the lucrative television market.

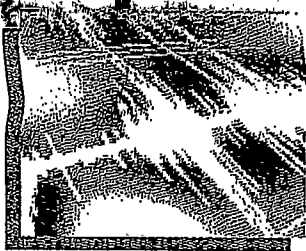
The monitoring licenses sought by BMI and ASCAP are in service of the interests of small copyright owners – all of whom are songwriters, composers or music publishers – to enforce copyright licenses for their music and are not at all contrary to Congressional copyright policy or interests. In fact, they are the persons the copyright law is designed to protect. The NCTA points out that the CEA itself has sought vast changes in the Commission's rules to protect its own perceived copying needs, including: (1) a unilateral change to the DFAST license and output restrictions (NCTA at Exh. D at 25) and (2) circumvention of the Copy Never Requirement (NCTA Exh. D at 14). Clearly the CEA is not shy about seeking to "circumvent" DMCA rights of copyright owners when it suits CEA's own perceived needs.

Very truly yours,


Howard M. Liberman

Attachment

cc (by e-mail): Monica Desai
Steven Broeckaert
Brendan Murray
Michelle Carey
Rick Chessen
Rudy Brioché
Amy Blankenship
Christina Pauzé
Catherine Bohigian
Mary Beth Murphy



AT A GLANCE

Landmark Digital ServicesSM LLC is a wholly owned subsidiary of BMI, and was created in August 2005 to exploit BlueArrowSM.

BlueArrow, a digital audio recognition technology patent purchased from London-based Shazam Entertainment, matches recorded music against an extensive database of audio-pattern "fingerprints."

BlueArrow is unique in its ability to identify recorded music within 1-2 seconds in high-noise environments with an accuracy rate of 99%.

Applications for the technology include monitoring and/or identifying music performed via radio, television, Internet, ringtones and other digital media.



LANDMARK

DIGITAL SERVICES

ABOUT LANDMARK DIGITAL SERVICES

Landmark Digital Services, LLCSM is a wholly-owned subsidiary of Broadcast Music, Inc. In 2005, BMI acquired all the intellectual property, including the patented digital audio pattern recognition technology from the UK's Shazam Entertainment Ltd, and formed Landmark Digital Services to own, deploy and exploit the technology.

Landmark Digital Services offers advanced audio-recognition enterprise solutions for content providers, copyright owners and consumers of music and digital entertainment. Through its BlueArrowSM technology, Landmark has established a reputation for unsurpassed accuracy in providing real-time, high-volume song identification services in consumer entertainment and commercial applications. Landmark is located in Nashville, Tennessee.

THE BLUEARROW ADVANTAGE

BlueArrowSM, Landmark Digital's core technology performs audio recognition with extraordinary accuracy, offering the highest level of value by providing:

- A method for recognizing an audio signal subject to a high level of noise and distortion
- A recognition method that can accurately identify music in 1-2 seconds, allowing for great flexibility
- The capability to recognize sounds based on samples from almost anywhere within the sound, not just the beginning
- Recognition which does not require sound samples to be coded or watermarked
- Recognition of any type of recorded audio, including sound, voice, music, or combinations of types via terrestrial or digital transmissions with customized reports identifying relevant metadata
- A database containing more than 3.2 million songs of various genres, from many countries which, because of the constant addition of new fingerprints and ability to handle a high volume of transactions, has virtually no boundaries in terms of scalability

BLUEARROW ➤

- Small code footprint that allows efficient integration into end-user applications, including web applications and consumer electronics
- A method able to recognize each of multiple sound recordings mixed together in a single stream
- An accuracy rate of over 99% with recognitions within 2 seconds, even in high noise environments

APPLICATIONS

BlueArrow is currently licensed to commercial entities in the media / entertainment industries and is being utilized by performing rights organizations to accurately fulfill obligations to copyright owners.

Applications for the BlueArrow technology include:

- Terrestrial Radio / TV monitoring including HD radio and HDTV
- Satellite Radio / TV monitoring
- Webcast monitoring
- Advertisement tracking & verification
- Audience measurement and data reporting
- Internet media data services
- Media identification for consumer devices
- Consumer-generated playlist organization
- Digital performance monitoring and reporting for media/ entertainment industries
- Media screening for user-uploaded audio and video internet content
- Ringtone recognition

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